SUPREME COURT, U.S.
FILED
MAR 18 1993
OFFICE OF THE CLERK

No. 92-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAVID B. DEUTSCH,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court should grant a Petition for Writ of Certiorari where the United States Court of Appeals for the Seventh Circuit employed the proper standard in reviewing the grant of a motion for summary judgment and where the Court of Appeals fully considered and correctly decided the issues presented by the Petitioner.

2. Whether the United States Court of Appeals for the Seventh Circuit properly affirmed the entry of summary judgment where the petitioner presented no evidence in opposition to the properly framed motion for summary judgment and where the petitioner did not contest the undisputed facts cited in support of the motion for summary judgment but instead chose to rely upon an unverified complaint and arguments in a responsive brief.

LISTING OF ALL PARTIES TO THE PROCEEDING

In addition to the identification in the caption, the respondent in this cause, Burlington Northern Railroad Company, is a wholly-owned subsidiary of Burlington Northern, Inc. Burlington Northern Railroad Company has interests in the following subsidiaries:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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OPINIONS BELOW

The petitioner misrepresents to this Court that the Motion for Publication of the Opinion of the United States Court of Appeals for the Seventh Circuit was by an "ex-parte request by the respondent." The respondent seasonably moved the Court below, with service of the Motion on the petitioner, for publication of the opinion.

CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

The Petition for the Writ of Certiorari is not timely and should be dismissed without further proceedings by this Court. As indicated in the petitioner's Appendix (A-11)

the United States Court of Appeals for the Seventh Circuit rendered its opinion on September 21, 1992. On October 7, 1992, petitioner filed a Petition for Rehearing with Suggestion for Rehearing En Banc. (A-19). In accordance with Rule 13 of the Rules of the United States Supreme Court, the Petition for the Writ of Certiorari was due ninety days after September 21, 1992, not later than December 20, 1992. Rule 13.4 provides that a suggestion made to a United States Court of Appeals for rehearing en banc is not a petition for rehearing which stays the time limit for filing the Petition for a Writ of Certiorari. Petitioner filed his initial Petition on January 19, 1993, thirty days after the expiration of the time limit for filing such a Petition. This Petition was rejected as not in conformance with the Rules and petitioner then filed a subsequent Petition.

Under the plain wording of Rule 13, and even assuming the accuracy of petitioner's statement that the Petition for a Writ of Certiorari was "properly filed" on January 19, 1993, this Petition is thirty days late and should be dismissed as jurisdictionally time-barred.

STATUTES INVOLVED

Rule 56 of the Federal Rules of Civil Procedure is involved in this Petition, specifically, Rule 56(c) and Rule 56(e), which provide:

> (c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Support and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Also involved in this Petition are Rules 12(m) and 12(n) of the Local Rules for the United States District Court for the Northern District of Illinois which provide:

(m) **Motions for summary judgment; Moving party.** With each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure the moving party shall serve and file, in addition to the affidavits (if any) and other materials referred to in Rule 56(e) and a supporting memorandum of law, a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law including a description of the parties and all facts supporting venue and jurisdiction in this Court. That statement shall consist of short numbered para-

graphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion.

(n) **Motions for summary judgment; Opposing party.** Each party opposing a Rule 56 motion shall serve and file, together with opposing affidavits (if any) and other materials referred to in Rule 56(e) and a supporting memorandum of law, a concise response to the movant's statement. That response shall contain (1) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and (2) a statement, consisting of short numbered paragraphs, of any additional facts which require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.

STATEMENT OF THE CASE

The petitioner's statement of the case does not comply with Rule 14.1(g) of this Court's Rules in that the statements set forth are not material to the issues presented in the Petition for the Writ of Certiorari and also contains misstatements. Accordingly, respondent submits this statement of the case.

The respondent presented its Motion for Summary Judgment, under Federal Rule of Civil Procedure 56, requesting judgment on plaintiff's Complaint, based on the sworn deposition testimony of the plaintiff, and which motion was predicated on a complete lack of negligence by the movant

in the accident in question. (A-22–A-29). The United States District Court for the Northern District of Illinois granted the motion on June 12, 1991 (A-9). The Motion addressed the entire claim made by petitioner in his cause of action. (A-9, A-10). As noted therein, the petitioner presented no evidence when responding to the Motion for Summary Judgment to raise a genuine issue of material fact but instead relied upon the allegations of his unverified Complaint. Following the entry of summary judgment, the petitioner filed an affidavit, in support of his motion under Federal Rule of Civil Procedure 59, which motion was denied by the United States District Court. (A-9–A-10). On appeal to the United States Court of Appeals for the Seventh Circuit, petitioner repeated the arguments made in the court below, and here, including the argument that the parties appeared for argument on the "motion," (an apparent reference to the summary judgment motion) on June 11, 1991 "but no argument was afforded by the District Court." As the Court of Appeals observed, the date of June 11, 1991 was not the date for "argument" on the Motion for Summary Judgment but rather was the date the respondent presented its motion to file a reply to the petitioner's response to the Motion for Summary Judgment. (A-15, A-16). Also, the Court of Appeals rejected petitioner's argument that respondent "amended" its Motion for Summary Judgment and that the petitioner was denied the right of due process to be heard. (A-17).

Lastly, petitioner states that respondent did not "file" the question and answer statement taken of the petitioner and marked as Exhibit 2 at his deposition. Petitioner argues here, as in his unsuccessful Petition for Rehearing with a Suggestion for a Rehearing En Banc to the United States Court of Appeals for the Seventh Circuit, that the respondent is guilty of "fraud" in the matter.

Petitioner states here he did not "discover" this "failure" to file the statement in the record until October 27, 1992.

Petitioner's statement that respondent committed "fraud" is in error for three reasons. First, at the conclusion of petitioner's deposition his attorney, who is also his counsel here, stipulated that the parties would submit, for purposes of the record, only the cover sheets of the exhibits marked at the petitioner's deposition, including Exhibit 2, which remained in the custody of the petitioner's attorney. Accordingly, at all times, petitioner's counsel was well aware that the "entire deposition" consisted of the petitioner's sworn testimony and the cover sheets of the Exhibits. Second, the Federal Rules of Appellate Procedure (FRAP 10 and 11) provide that it is the appellant (the petitioner here), and not the appellee, who is responsible for ensuring that the record on appeal is complete and correct. Third, as observed by the United States District Court and the Seventh Circuit Court of Appeals, the petitioner never presented any affirmative evidence to resist the Motion for Summary Judgment. In resisting the motion petitioner never relied on or referred to the question and answer statement of petitioner.

ARGUMENT

I.

THE PETITION FOR THE WRIT OF CERTIORARI ADVANCES THE SAME ARGUMENTS PETITIONER MADE IN HIS APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WHICH THE COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED IN ACCORDANCE WITH THE DECISIONS OF THIS COURT.

A. Petitioner's Argument That the United States District Court Allowed Respondent to "Amend" the Motion for Summary Judgment, in Violation of the Federal Rules of Civil Procedure Is Without Basis or Support in the Record.

Petitioner's primary argument in requesting this Court to issue a Writ of Certiorari is that petitioner was denied "due process" because respondent was allowed to "amend" its Motion for Summary Judgment. In support of this contention, petitioner misrepresents the status of the record in the trial court and ignores the analysis of the United States Court of Appeals for the Seventh Circuit.

The Appendix submitted to this Court by the petitioner completely contradicts his argument. Contrary to the bold statements in the Petition, the District Court did not allow "the respondent to amend its motion through a memorandum filed on June 11, 1991." Rather, the District Court allowed respondent to reply to petitioner's response to the Motion for Summary Judgment. In that reply, respondent argued that petitioner had introduced no evidence which raised a genuine issue of material fact concerning the respondent's alleged negligence and that petitioner had mischaracterized the deposition testimony of the petitioner in his response to the summary judgment motion. (A-34 to A-39).

This issue was again raised by the petitioner in his Rule 59 motion where he argued that the trial court had "improperly expanded the Motion for Summary Judgment." (A-9). As articulated by the District Court, there was no misapprehension or confusion in the record that respondent's Motion for Summary Judgment was intended to, and did, encompass all of petitioner's claims and there was no "expansion" or "amendment" of the motion by the reply. (A-9, A-10).

Petitioner's confusion in the court below and his argument in this Petition is based on counsel for petitioner's misunderstanding of the nature of a summary judgment motion. (A-5). As explained to the petitioner by the District Court, the non-moving party must present affirmative evidence to overcome a properly supported motion for summary judgment. (A-5). See *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986), cited by the United States District Court. Petitioner's argument that respondent's reply, which stated that petitioner failed to produce *any* evidence at all to support *any* of his allegations, was in fact an "amendment" to the Motion for Summary Judgment is based on a misunderstanding of *Celotex*. Such a misunderstanding, which continues on the part of petitioner, is not a basis for this Court to grant a Petition for a Writ of Certiorari.

The case law cited by the petitioner does not support his position that respondent violated Federal Rule of Civil Procedure 7(b)(1). In *United States v. Krasnov*, 143 F.Supp. 184 (E.D.Pa. 1956), the District Court held that where, as here, the motion states it is based on Rule 56 of the Federal Rules of Civil Procedure, and the motion articulates the relief sought and the bases for the motion, the "motion is so explicit, [and] the grounds therefore have been set forth with particularity within the mean-

ing of Rule 7(b)(1) of the Federal Rules of Civil Procedure." In *Dunbar v. Triangle Lumber and Supply Company*, 816 F.2d 126 (3rd Cir. 1987), the Third Circuit Court of Appeals held that where a dismissal motion is entertained due to the failure of a litigant's attorney to adhere to the prior orders of the Court, the litigant must be given notice of the hearing. In *Raitt v. Seltzer*, 10 FRD 48 (D.C.N.Y. 1950), the motion in the Federal District Court stated it was "pursuant to the provisions of the Civil Practice Act of the state of New York."; the District Court observed that the misidentification of the provision relied upon was fatally defective to the motion. The aforementioned cases are not applicable to the Petition here.

There is no legal support for petitioner's request for Writ of Certiorari. Petitioner cites a host of inapplicable cases in an effort to persuade this Court that the holdings therein were ignored by the Seventh Circuit Court of Appeals. As an example, in *Morgan v. McDonough*, 689 F.2d 265 (1st Cir. 1982), the motion at issue, unlike respondent's summary judgment motion in the instant case, was unaccompanied by any stated grounds for relief. *Wolgin v. Simon*, 722 F.2d 389 (8th Cir. 1983), merely states that the motion must be made in writing, must state the grounds for the motion and must set forth the relief sought. Respondent's motion for summary judgment adhered to every aspect of these requirements. (A-22-A-29). In *Martinez v. Trainor*, 556 F.2d 818, 819-20 (7th Cir. 1977), the motion in question was expressly a motion to "Amend, Alter, or Vacate the Declaratory Judgment" pursuant to Federal Rule of Civil Procedure 59(e), which the Court of Appeals held would not extend the time for filing the notice of appeal. That decision has no applicability to the issue before this Court. In *Davis v. Hall Engineering*,

Inc., 549 F.2d 314 (5th Cir. 1977), the Court of Appeals merely observed that the motion presented must state with particularity the grounds on which it is based.

Respondent adhered to the requirements of Rule 7(b)(1) of the Federal Rules of Civil Procedure. The Motion for Summary Judgment plainly stated it was based on Rule 56 of the Federal Rules of Civil Procedure, was grounded on petitioner's deposition concerning the facts of the incident, and requested judgment on the Complaint of the petitioner. Not one case cited by petitioner in his Petition for Writ of Certiorari in any way supports petitioner's requested relief.

B. The United States Court of Appeals for the Seventh Circuit Applied the Correct Legal Standard and Properly Decided the Issues Presented by Petitioner.

On appeal, the Court of Appeals for the Seventh Circuit correctly determined that *Celotex*, *supra*, required that petitioner, in responding to a properly supported motion for summary judgment, set forth specific facts or evidence "showing a genuine issue of material fact existed. . ." The Court of Appeals, also citing *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613 (7th Cir. 1989), properly held that petitioner failed to introduce any such evidence. (A-14, A-15).

As to the alleged violation of petitioner's "due process" rights, the Court of Appeals noted that there was "some confusion in Deutsch's [petitioner's] briefs as to whether he is also claiming he was denied the opportunity to be heard as to Burlington Northern's motion for summary judgment." (A-16). In the Petition for Writ of Certiorari, petitioner implies that the Motion for Summary Judgment was scheduled for oral argument on June 11, 1991. However, the Court of Appeals correctly noted that no oral

argument was ever scheduled and the record did not reflect that petitioner ever requested oral argument. The Court of Appeals further noted that June 11, 1991 was merely the date respondent moved to submit its reply. In fact, as respects petitioner's argument that the Motion for Summary Judgment was "expanded" or "amended in the reply," the Court of Appeals specifically found that the initial Motion for Summary Judgment by respondent was sufficient to encompass all of the petitioner's claims, irrespective of the reply, and it was unnecessary to resolve the issue of the "procedural sequence of events surrounding" the respondent's reply. (A-17).

Petitioner argues that the essence of "due process" is fundamental fairness, citing *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), where the petitioner argued she was denied assistance of counsel in violation of due process, as guaranteed by the Fourteenth Amendment of the United States Constitution. This opinion, and all others cited by petitioner on the issue of "due process," contains general statements of law, but none has any application on the issue presented to this Court, i.e., whether petitioner was denied "due process" in the proceedings on the Motion for Summary Judgment. Petitioner's response to that motion was comprised solely of an ad hominem attack on respondent's counsel and an unacceptable misstatement of the critical legal principles. Now, in an effort to trigger this Court's review of the well-considered opinions of the courts below, petitioner argues that this Court should exercise its "supervisory powers" to correct a deprivation of "due process" caused by a suggested denial of a right to respond. As correctly observed by the Seventh Circuit Court of Appeals, there is no requirement of a hearing for oral argument on summary judgment motions, and petitioner did

not request such an argument. As to a written response, as both the District Court and the Seventh Circuit Court of Appeals observed, petitioner did have ample opportunity to contest the Statement of Undisputed Facts filed by the respondent, in accordance with Local Rules 12(m) and 12(n) of the United States District Court for the Northern District of Illinois (in the absence of which response such facts are deemed admitted) and more than ample opportunity to appropriately resist respondent's Motion for Summary Judgment. (A-2, 3, 9, 10, 14, 15, 16). Petitioner's failure to appreciate this Court's holding in *Celotex*, and subsequent opinions dealing with summary judgment motions, does not amount to a denial of due process as petitioner suggests.

II.

PETITIONER'S ARGUMENT HERE THAT RESPONDENT COMMITTED A "FRAUD" UPON THE COURTS BELOW IS A PATENT MISREPRESENTATION TO THIS COURT.

Petitioner argues that the courts below were "deprived" of a critical document in ruling on the Motion for Summary Judgment and the appellate review of the District Court's action. What petitioner does not reveal to this Court is that petitioner never referred to this document, cited the document, or otherwise relied upon the document in resisting respondent's Motion for Summary Judgment or in appealing the grant of same. Instead, following the disposition of the appeal, petitioner, in his Motion to Reconsider, argued that respondent committed a "fraud" in failing to include the statement in the record on appeal.

As seen by Appendix K1, it was counsel for petitioner who announced at the termination of the deposition of petitioner that the parties had stipulated that the exhibits

to the deposition transcript would consist of the "first page" only, which inclusion with the deposition transcript would suffice for purposes of the record, and that counsel for petitioner would maintain custody of Exhibit 2. When respondent filed the "entire" deposition transcript (excerpts were attached to the motion) it was simply following the requirements of the Federal Rules of Civil Procedure and the stipulation as to the record of the deposition, entered by the parties. Second, it was the petitioner, the appellant below, who had the responsibility to correct any deficiencies in the record on appeal. Third, petitioner did not contest respondent's statement of uncontested facts which were set forth in the summary judgment motion, nor did petitioner submit any evidentiary materials in opposition to the motion. Petitioner never referred to the question and answer statement until after the Court of Appeals rendered its opinion.

Petitioner wrongly argues that the District Court, and reviewing court, have an obligation to extensively search the record for "material facts." Petitioner, in responding to the motion for summary judgment and appealing the grant of same, never considered any facts to be sufficiently "material" to bring them to the attention of the District Court, or the Court of Appeals. Now, even in this Petition, petitioner does not recite any "material facts" purportedly contained in the question and answer statement. Nor does petitioner explain how the District Court or the Court of Appeals erred in failing to consider the question and answer statement which never served as a basis for petitioner's resistance to respondent's Motion for Summary Judgment. As the District Court and the Court of Appeals both noted, petitioner simply did not understand his responsibility in responding to a properly supported motion for summary judgment.

CONCLUSION

A review of the opinions of the United States District Court and the United States Court of Appeals for the Seventh Circuit demonstrates that any complaint petitioner has is with the law as articulated by the United States Supreme Court in *Celotex*, *supra*, and not with an absence of appropriate "notice" or with a deprivation of due process. The petitioner has advanced no supportable basis for this Court's issuance of a writ of certiorari. Respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

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APPENDIX K1

* * * * *

the original signature page and I will get it taken care of.

THE NOTARY: Will do.

(The document was thereupon marked Deutsch Deposition Exhibit No. 4 for identification as of March 14, 1991.)

MR. SCHUM: Why don't you show on the record then that Exhibits 1 through 4 remain in the custody of the attorney for the Plaintiff and Exhibit 4 will remain in the cutody of Mr. Newell as attorney for the railroad and that the cover sheets shall suffice for purposes of the original deposition record to designate what those exhibits were.

AND FURTHER DEPONENT SAITH NOT